Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN W. WHITTLESEY,

Petitioner,

-against-

OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINSTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN W. WHITTLESEY
Petitioner Pro Se
Counsel of Record
310 Douglas Road
Chappaqua, New York 10514
(914) 238-4390

PRINTINGHOUSE PRESS
25 West 43rd Street New York, New York 10036 (212) 719-0990

64 pp

QUESTIONS PRESENTED

Did the Court below and the Merit Systems Protection Board improperly and unconstitutionally: (1) uphold and apply rules restricting Administrative Law Judges of the Social Security Administration from the private practice of law which are invalid as unconstitutionally overbroad in violation of the First Amendment to the Constitution; (2) uphold and apply the application of work hours and attendance rules of the Social Security Administration which violate the Federal Fair Labor Standards Act as amended; and (3) uphold and apply evidentiary rulings which deprived Petitioner of an impartial and fair trial in violation of the First and Fourth Amendments to the Constitution in ordering and approving the removal of Petitioner from his position as an Administrative Law Judge of the Social Security Administration?

PARTIES

The parties are fully stated in the caption of this case.

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OPINIONS BELOW

The Judgment of the Court of Appeals for the Federal Circuit ws rendered without opinion on October 12, 1994. The opinion accompanying the Merit Systems Protection Board Decision of December 7, 1993 is appended in Appendix A.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioner was appointed an Administrative Law Judge (ALJ) with the Social Security Administration (SSA) (Agency) in August of 1990. He was charged in May of 1991 with unauthorized practice of law and agreed to undergo a 30-day suspension rather than contest such claims. In November of 1992, he was again charged with the

practice of law as well as some nine violations of alleged time and attendance requirements of the agency. Appendix B. A trial before Administrative Law Judge Reidy of the Merit Systems Protection Board was held on February 2, 1993.

Petitioner was found to have acted as charged in Judge Reidy's Recommended Decision of March 9, 1993. He appealed to the Merit System Protection Board which upheld the Recommended Decision on December 7, 1993, resulting in Petitioner's removal from his position. The MSPB docket number is CB7521930005T1.

Petitioner timely appealed to the Court of Appeals for the Federal Circuit. The matter was orally argued October 7, 1994. The Court issued a decision without opinion on October 12, 1994, from which Petitioner has appealed for Writ of Certiorari to this Court. The docket number in *Whittlesey v. SSA* is 94-3151. Appendix C.

Jurisdiction of the Court of Appeals for the Federal Circuit is pursuant to 28 U.S.C. 1295(a)(4)(6)(10) and for this Court is 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The incidents and procedures which led to this petition have been summarized in the statement of grounds on which jurisdiction is here being sought.

The regulation regarding restitution is here being sought.

The regulation regarding Restrictions Applying To Administrative Law Judges is set forth in the SSA Guide on Employee Conduct and reads as follows:

> Section VII. *Outside Employment* (73.735-401) An Administrative Law Judge may not become an advocate for litigants or actively participate in any controverted legal action or proceeding. To do so raises the question of the propriety of a Federal officer playing a dual role, as advocate or participant in

disputed matters between parties, and as an Administrative Law Judge before whom such parties later may appear to pursue their rights under the Social Security Administration program. This practice also creates the appearance, if not the fact, of a conflict of interest in many situations, a conflict of interest in many situations. Therefore, no Administrative Law Judge may:

> 1. Engage in outside legal activities involving representation, either formal or informal, as an advocate for clients; or
>
> 2. Participate in any professional capacity as, for example, an advocate, hearing officer, or attorney of record in any litigated or controversial legal action or proceeding in any Federal or State court or before any quasi-judicial forum, other than as required by his official duties. With respect to the performance of official duties, he shall not conduct a hearing on a case wherein one of the claimants has ever been represented by the Administrative Law Judge in a litigated or non-litigated matter.

No written rule regarding the eight hour day, forty hour week said to have been required of Petitioner herein was ever presented at the trial of Petitioner; or to the Merit Systems Protection Board; or to the Court below.

The Standards of Ethical Conduct for Employees of the Executive Branch contains no specific limitations on Administrative Law Judges. The Fair Labor Standards Act, sections 203(c)(2), 207(a)(1) and 213(a)(1) cited *infra* are set forth in Appendix D.

The provisions of 29 C.F.R. 541.3, 541.5(d), 541.100 and 541.118 are added hereto in Appendix D.

An article, *Complaint Procedures Initiated By and Against Administrative Law Judges Need Reform Now* appears as Appendix B.

I.

THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT WAS ERRONEOUS BECAUSE IT UPHELD AN UNCONSTITUTIONAL RULE AND ITS APPLICATION TO PETITIONER

The SSA Guide, *supra*, contains certain prohibitions on outside activities of Administrative Law Judges employed by the Social Security Administration (Item VII, *Outside Employment*, Section I, *Restrictions Applying to Administrative Law Judges*, as set forth in the Statement of the Case).

This is the provision for alleged violation of which Petitioner was terminated. It cites as its source HHS *Regulations* 45 C.F.R. 73.735-401. It is clearly unconstitutional, improperly overbroad, overstated and unjustifiably curtails activities of any Administrative Law Judge unrelated to or outside of his job duties. Specifically, the provision violates the First Amendment of the U.S. Constitution which, in pertinent part, says that: "Congress shall make no law abridging the freedom of speech." Such right has been frequently held by this Court to extend to commercial activities.

And it clearly as such protects the practice of law outside of an ALJ's ambit of job requirements. The practice of law obviously requires speech whose use cannot be limited by mere regulations, as the decisions of this Court clearly hold. *See infra.*

Indeed in a matter already argued before this Court, *National Treasury Employees Union (NTEU) v. United States*, 990 F.2d 1271 (D.C. Cir. 1993) rehearing *en banc denied*, 3 F.3d 1555 (1993), argued before this Court in November 1994, the Court held that a statutory prohibition against honoraria and other activity by Federal executive department employees was unconstitutionally overbroad

because it was not limited to payments where there was some "nexus" between the employee's job and either the subject matter of the expression or the character of the payor.

The MSPB in this matter said it found such a "nexus" between the practice of law and the position of an ALJ. Such a connection, however, is completely foreign to the functions required of an ALJ working for SSA. Such a position demands handling petitions for disability benefits and, occasionally, denials of regular social security or Medicare benefits. Such a position involves, typically, a myriad of semi-formal hearings, scheduled monthly, not only at a Judge's home office but at many other SSA offices as required. The applicants for benefits are generally poor; unable to sustain gainful employment; beset with physical or mental disabilities.

It is clearly appropriate for SSA only to prohibit its ALJs from representing or advising such claimants privately. Such practices clearly have a "nexus" with the position of a SSA ALJ. And, indeed, the practice of such law was never charged, let alone proven, against Petitioner.

But it is clearly not appropriate for SSA, as *NTEU* makes crystal clear, to impinge on the private lives of its employees to prohibit *all* outside practice of law, whether or not related to the ALJ's described position and duties. The scope of such duties are narrow in nature hardly comparable to a Court Justice.

Indeed, SSA itself makes the position one of advocacy, since ALJs are required to develop the claim record for the applicant, something quite different than the posture of a court judge. Hearings are customarily brief, rarely exceeding one hour. It is easily possible—as Petitioner has done—to complete up to 100 hearings a month and decide the issues without any particular difficulty. The application or use of the rules of evidence is scanty. The hearing, indeed, consists largely of the ALJ questioning the claimant in accordance with a pre-set outline of information required to be elicited.

There is no appearance of impropriety, but alone conflict of interest, in an ALJ acting as advocate in a non-SSA "dispute" between parties unrelated to SSA disability matters who will never appear before the ALJ. No such activity would in any way affect an ALJ's work or justify the limitation on Petitioner's activity, privacy and right of untrammelled utterances, whether verbal or written.

The free speech amendment to the Constitution is the cornerstone of American democracy. As this Court has often held, it cannot be transgressed as to any person, for whatever reason. The ability to speak and write without fear of penalty is a major feature of our system of government which distinguishes it from many others extant whose system and rule ranges from the tyrannical to the oppressive. The free interplay of thought, ideas and expression is absolutely essential to its maintenance. This Court has rigorously prevented any limitations on such freedom of expression.

But to impose a ban on commercial speech solely and merely because it "may" create an impropriety or "may" result in a "conflict of interest," as the SSA, without support, has here done (MSPB decision, p. 16) is akin to the mistake of throwing the baby out with the bathwater.

The MSPB decision pivots on the allegation that Petitioner has no "constitutional right to the practice of law."

No one denies that the practice of law is legitimate however, or that the regulation here in question curtails the right of Petitioner to enter it even though it does not impinge on ALJ functions, or that such activity has no relationship whatever to the job functions of an ALJ. Propping up the SSA regulation by reiterating "buzz words" empty of meaning (such as alleging "erosion of public confidence in the administrative law system" would result) and wholly unsupported by facts serves not one iota in purging the regulation prohibiting ALJ "practice of law" of its antipathy to the First Amendment to the U.S. Constitution.

The problem, of course, is that the Agency rule against law practice by ALJs outside of the scope of their government position

is just as overbroad as the rule upset in *NTEU*. Indeed, *NTEU* found that some of the concerns addressed by the unconstitutional statute were legitimate but that the overbroad, sweeping prohibition was "overinclusive" and that was what placed the burden on free speech that required holding the statute unconstitutional. The same principle applies here; the rule invoked in this matter is clearly overbroad, and cannot, for that reason, be sustained. Indeed, one of the reasons the *NTEU* court found the statute "overinclusive" was because it broadened the previous rules to prevent receipt of honoraria for articles or speeches by government employees *unrelated to their work*, just as the prohibition here cited by the Agency is overbroad in that respect and cannot for that reason be upheld.

The Supreme Court has upheld the doctrine that the First Amendment applies to commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)

Justice Stevens, in *Cincinnati v. Discovery Network, Inc.*, __ U.S. __ No. 91-200, 53 S.C. Bull. B. 1482/3/24/93), states further, quoting Justice Blackmun, that "Speech does not lose its First Amendment protection because money is spent to protect it, as in a paid advertisement of one form or another... Speech is likewise protected even though it is carried in a form that is sold for profit... and even though it may involve a solicitation to purchase or otherwise pay or contribute money" (Citations omitted).

The Court stated further, in *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983), that:

> "we specifically declined to recognize a distinction between commercial and non-commercial speech that would render this interest a sufficient justification for a prohibition on commercial speech."

In this matter before the Court, the practice of law clearly involves commercial speech. The *Cincinnati* Court cited *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) that no regulation of engaging

in protected speech can survive unless it is "without" reference to the content," which clearly does not describe the regulations here.

A recent decision in the Court of Appeals for the Ninth Circuit, *U.S. West v. U.S.A.*, (9th Cir., 1/3/95) No. 94-35795 points up even more forcefully the fact that the First Amendment bars limitations not reasonably supported on the right to do business. In that case, most recently decided, yet supported by a decision in the Fourth Circuit and several federal district courts, the Court held a telephone company could not be barred from entering the cable-TV market by a provision of the 1984 Federal Cable Act. The prohibition was held overly broad and a violation of petitioner's free speech rights, as is the regulation challenged herein.

The government's claim that the prohibition promoted "competition," and was thus permissible, was found by the Court to have been unsupported by the evidence, precisely as is the prohibition against ALJs practicing law equally unsupported as to necessity by any evidence presented by the government. See Appendix K.

Where First Amendment freedoms are at stake, a greater degree of specificity and clarity of laws and regulations is required than would otherwise be needed. *Ken Inc. v. Kitsap County*, (9th Cir. 1986) 73 F.2d 1053. Public employees may not be compelled to forfeit their constitutional rights when they accept such employment. Moreover, an attorney has the First Amendment right, under standards applicable to commercial speech, even to advertise a trial speciality for which he cannot be disciplined. *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 L.Ed.2d 83, 110 S.Ct. 2281 (1990). Commercial speech may be restricted only if the government's interest in doing so is substantial; the restrictions directly advance the government's asserted interest; and the restrictions are no more extensive than necessity to serve that interest. *State of Kansas v. U.S.*, 305 U.S. App. D.C. 14, 16 Fed.3d 436 (1994). *U.S. v. Edge Broadcasting Co.*, (9th Cir. 1993), __ U.S. __, 125 L.Ed.2d 345, 113 S.Ct. 2696. Such regulations as may arise are to be judged on whether they represent the "least

restrictive" means of achieving objective, not whether the restrictions have a rational basis, *City of Cincinnati v. Discovery Network, supra.*

The regulations here in question clearly do not meet such objectives and are ripe for overturning.

II.

THE IMPOSITION OF DISCIPLINE BY SSA FOR ALLEGED VIOLATIONS OF ILLEGAL WORK TIME REQUIREMENTS VIOLATED FEDERAL LAW.

Petitioner's position with SSA was subject to requirements, never documented as to source, that he work and be at his "duty station," a term obviously borrowed from the military, forty hours a week, eight hours per day.

The federal Fair Labor Standards Act, 29 U.S.C. 207(a)(1) mandates that all employers pay their employees overtime at the rate of time and one half such employee's "regular rate of pay" for all hours worked beyond forty in any one work week. This statute was made applicable to all federal employees by a 1974 Congressional Amendment thereto in Section 203. Petitioner, however, was proportedly not covered by such requirement because he was a professional employee exempted from the Act under 29 U.S.C. 213(a)(1) and Wage-Hour Regulations 541 issued thereunder.

Thus, unless Petitioner was exempt from such statutory requirements, failure of the agency to offer or make available to him overtime pay was and is unlawful.

Payment on a salary basis such as Petitioner was paid here is a requirement of such exemption. It means that, under Regulations 541 of the Act, compensation cannot be made dependent on the number of hours worked by an employee. See Appendix D for 29 C.F.R. 541.118 describing the term salary basis. An employee to be paid on a salaried basis must be paid a predetermined amount not subject to deductions due to quantity or quality of work, and must be paid

his full salary for any week in which such employee performs any work without regard to the number of days or hours worked in that week. 29 C.F.R. 541.118. *Walling v. Morris*, 155 Fed.2d. 1832 (1946) vacated on other grounds 322 U.S. 422 (1947). *McReynolds v. Pocahontas Corp.*, 192 F.2d 301 (4th Cir. 1951).

See *Martin v. Malcolm Pirnie*, 945 F.2d 611, (1991 2d Cir.) *cert den.*, __ U.S. __, 113 S.Ct. 298, 121 L.Ed.2d 222, ruling that employees were not entitled to be considered exempt where the employer made deductions from pay on the basis of part-day absences and where employees were required to work an eight hour day. It does not matter, the court said, that deductions were not actually made; it is enough to defeat the exemption if the employer retained the power to do so. See also *McDonnell v. City of Omaha*, 999 F.2d 298 (8th Cir. 1993); *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993); *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993); *Dole v. Walker and Armstrong*, 763 F.Supp. 1052 (D.Ariz. 1990) and *D'Camera v. District of Columbia*, 693 F.Supp. 1208 (DDC 1988) holding no exemption applied when a policy of deductions was established, even though only sporadically applied and not mandatory. *Abshire v. County of Kern*, 908 F.2d 483 (CA9, Calif. 1990) *cert. den.*, __ U.S. __, 111 S.Ct. 785, 112 L.Ed.2d 848 (1990) found no FLSA exemption possible where salaried employees were subject to deductions for absences of less than one day, even though no such deductions were actually made. *Brock v. Superior Care Co.*, 840 F.2d 1054 (2d. Cir. 1988).

The application of the above in this matter is clear. Respondent, as an Administrative Law Judge, is subject only to Agency rules and policies that are valid and validly enforced. However, one of the rules which the Agency seeks to apply and did here is that an ALJ must work an eight-hour day, five days per week. If the ALJ does not do so, or is absent any part of a day, deductions will be—and were in this matter—made from his salary.

It is thus obvious that, despite FLSA Regulations, and court precedent, an ALJ is *not* paid on a salary basis, but is in fact paid an hourly rate, and is not thereby exempt from section 207 of the Act.

Indeed, an ALJ's bi-weekly pay stub or report uniformly contains a statement of his hourly rate.

The Agency cannot have it both ways, as it has clearly attempted to do here. It cannot declare an employee exempt from overtime requirements and pay him on a salary basis and yet make, as it did here, deductions from his pay (which effectively require him to be paid overtime) without in fact doing so.

The Agency policy of requiring any ALJ to work or be present an eight-hour work day, five-day work week is not legally applicable to ALJs because it violates the Fair Labor Standards Act, and cannot be used as the basis for any disciplinary actions. If the Agency policy is to pay an ALJ on a salaried basis and declare him exempt from statutory overtime requirements, it can lawfully do so only without making deductions for absences of less than one day, because that is what the FLSA requires as a condition of applying the exemption.

It may be argued that the 1992 Wage-Hour exemption regulations 29 C.F.R. 118.5(a) allow a public employer to deduct from an otherwise exempt employee's salary money for time not worked under certain conditions, while preserving the exemption. Such regulations are not retroactive. *McDonnell v. City of Omaha*, 99 F.2d 293 (8th Cir. 1993). But, even assuming that to be the case, if a public employer *disciplines* an

> "otherwise salaried employee through deductions for anything other than major safety violations, it violates the (1992) current regulations 29 C.F.R. section 541.118(a)(5)."

Stewart v. San Francisco, 126 LC JP33028 (U.S.C. N. Dist. Calif., Nos. C-90-3206-CAL and C-91-0922-CAL 10/5/93 1993).

In *Avery v. City of Talledega, Alabama*, (11th Cir. 7/5/94) No. 93-6353, 128 LC TP46.683. The Court ruled that

> "regulations expressly limit the disciplinary exemption for loss of salary to violations of safety rules relating to prevention of serious danger to the

> physical plant of the employer or to other employees...."

The Court held that the suspension of a public employee for other reasons destroyed the exemption for all heretofore exempt employees.

III.

PETITIONER WAS DEPRIVED OF A FAIR AND IMPARTIAL TRIAL HEREIN BY NUMEROUS ERRONEOUS RULINGS OF THE MERIT SYSTEMS PROTECTION BOARD

The rulings of the MSPB upheld by the Court below deprived Petitioners of a fair and impartial trial, even though of the four original charges brought, Charge IV was fully dismissed, as were two of the five specifications of Charge I.

1) Support of Charge Based on Stolen Evidence Improper

The first error below was in upholding a third specification of Charge I alleging an instance of claimed practice of law. Such specification charged that Petitioner had represented a "client" in an "unknown forum," and was based on the reading of handwritten notes delivered to Petitioner at his office by an "unknown individual," and intercepted by Hearing Office Chief Administrative Law Judge Harap in flat violation of the Code of Ethics of the American Bar Association and of the Fourth Amendment to the Constitution.

The ABA ruling 1992-346 violated forbade any attorney to intercept any communication to another which violated the attorney-client privilege or any other requirement of confidentiality.

The Fourth Amendment to the Constitution reads as follows in pertinent part:

> "The right of the people to be secure in their persons, houses, *papers* and effects, against unreasonable searches and seizures shall *not* be violated..." (Emphasis ours).

The papers unlawfully intercepted by HOC ALJ Harap contained no statement that Petitioner had represented the said client as Harap admitted at trial. Indeed, the agency didn't even specify the forum in which the representation was said to have taken place.

Moreover, this specification of Charge I involved, contrary to the government, the same incident as a specification of Charge IV which was dismissed as of no material consequence by the MSPB which also assumed that the ABA opinion referred only to violations of the attorney-client privilege which its language does not. Its scope is far broader than the privilege and clearly extends to all invasions of privacy by an attorney, such as ALJ Harap.

Material, which did not state Petitioner was a client's representative was thus used to convict Petitioner of representation of a "client" in an "unknown forum." Clearly the charge is *per se* insufficient for want of specificity, in addition to its other defects. Such a rule taints the proceedings below irreparably and itself requires reversal.

2) MSPB Improperly Applied "Implicit" Rule

MSPB ruled that approval to be absent from Petitioner's work station is "required by the agency's rule requiring him to work an eight-hour day and to record his comings and goings on a register." Such requirement was said to be "*implicit*" in the above-cited rule. Such ruling was made only to relieve the agency of its unfulfilled burden of proof (MSPB decision p. 13) that Petitioner's alleged absences from the office were for matters other than business and for no other reason.

The claim that Petitioner must stay at his work station during his eight-hour daily tour of duty is nowhere made explicit and no such rule was presented in evidence to the Court below or to MSPB.

Petitioner has elsewhere (Item II herein) shown the illegality of this work requirement.

The MSPB ruling is clearly erroneous regardless of the eight-hour rule. A rule must be explicit to support an alleged violation, not implicit. MSPB cannot engage in rule-making for any agency.

The rule announced by MSPB is an improper and unconstitutional intrusion into the work-life of professional employees of the agency. Thus, the effect, which is indeed to shift the burden of proof from the agency to Petitioner is one which automatically foredooms it to reversal.

3) The MSPB Upheld a Charge Unlawfully Not Drafted with Particularity

Charge II of the complaint herein alleged that Petitioner "knowingly and willfully" violated the terms of a May 1991 settlement agreement by engaging in the practice of law.

5 C.F.R. 1201.133 *requires* that any such charge be accompanied by a description or the particulars thereof. It says:

> "To initiate a complaint against an Administrative Law Judge, an agency must file with the Board (MSPB) a complaint describing *with particularity* the facts that support the proposed action." (Emphasis added)

Charge II contained no such particulars but merely a recital of the settlement agreement. It never specified in what way Petitioner had violated that settlement agreement. MSPB, without support, alleging that "administrative pleadings are to be liberally construed," transferred the particulars of Charge I to Charge II, and thus attempted to validate the latter charge whose drafting and content clearly did not meet the requirements of the relevant rule.

"Liberal construction" of pleadings, of course, does not, and cannot, mean consciously amending them to make them say what

they manifestly do not. Yet that is what MSPB has done in its decision herein and the result is an unlawful ruling.

4) Evidence Not Properly Authenticated was Improperly Admitted

The agency herein, SSA, presented, in effect, no evidence in support of Specifications D and E of Charge I.

What was improperly admitted at the hearing and trial, on an offer by SSA attorneys alone, was a mass of paper, purporting to be from the New York Workers' Compensation Board, showing that Petitioner had appeared before two Board hearings on behalf of clients.

The evidence was admitted although no one from the Board was called to authenticate the validity of such evidence, which after its admission, was then improperly applied (MSPB decision, page 8) to show that Petitioner was present, despite the ruling in *U.S. v. Arias*, 575 F.2d 253 (9th Cir. 1978), *cert. den.* 439 U.S. 868, that the contents of such documents are not admissible for the truth of the matter therein contained, applied by MSPB as well.

The use of hearsay is strictly limited and does not extend to validating allegations that certain individuals were present on any given occasion. Hearsay evidence which is unauthenticated at all, as here, cannot be used for evidence.

5) Other Improper Rulings

Numerous other examples of lack of impartiality both by the trial judge and MSPB were cited by Petitioner in his briefs below. They began even before the trial and involved such questionable tactics as admittedly issuing subpoenas beyond the scope of the charge; *ex post facto* validation of Agency legally insufficient motion, cured by exempting it from the requirements of the governing regulation (5 C.F.R. 1201.55(a)); following such obviously partisan action by granting the motion before Petitioner was given a chance to reply; dismissing Petitioner's motion to dismiss without giving the Agency

any chance to respond; and thereby gratuitously and with prejudice to Petitioner retaining, *inter alia*, in the original charges derogatory language aimed at Petitioner which was never further supported or even explained by the agency.

It also included admissions into evidence of wholly unsupported statements about adverse effect on office morale of Petitioner's conduct whose originators were never called to testify so that Petitioner could cross-examine them.

All of the above is in clear contradiction to the rule recently set forth in *ABF Freight Systems v. NLRB*, __ U.S. __, 127 L.Ed.2d 152, 114 S.Ct. 835 (1994) that an agency decision cannot survive if it is arbitrary, capricious or manifestly contrary to law. The Administrative Procedures Act, 5 U.S.C. 556(d) forbids any sanctions without consideration of the whole record, which must be supported by and be in accordance with reliable, probative and substantial evidence. *Steadman v. U.S.*, 450 U.S. 91, 67 L.Ed. 89, 101 S.Ct. 999 (1981). The proponent of a charge has the burden of proof, *American Trucking Association v. U.S.*, 344 U.S. 298, 97 L.Ed.2d 337, 73 S.Ct. 307 (1953) and the burden of going forward is on the proponent. These requirements were honored more in the breach than in the observance in these proceedings.

Indeed, the conduct of this matter clearly is one of grave concern to ALJs generally. Such concern was expressed by Mr. Delbert R. Terrill, Jr., writing in the *American Bar Association Journal for Judges* in the fall of 1994. The article is reproduced in full in Appendix B.

IV.
CONCLUSION

The dismissal of this matter by the Court below apparently paid no heed to those questions, as well as the others raised herein, and leaves unanswered many of the important issues described in this petition. They are of great importance to public interest and should therefore be considered by the Supreme Court and resolved, especially as to those matters which are before this court in parallel and applicable rulings.

Wherefore we pray that the Writ of Certiorari be issued so that these matters above set forth may be considered and resolved.

Dated: January 9, 1995

Respectfully submitted,

JOHN W. WITTLESEY
Petitioner Pro Se
310 Douglas Road
Chappaqua, New York 10514
(914) 238-4390

APPENDICES

APPENDIX A

United States of America

MERIT SYSTEMS PROTECTION BOARD

WASHINGTON, D.C. 20419

OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION,

Agency,

v.

JOHN W. WHITTLESEY,

Respondent.

DOCKET NUMBER CB7521930005T1

DATE: DEC 7 1993/stamp

Donald Przybylinski, Esquire, and
Sarah A.L. Humphreys, Esquire,
Falls Church, Virginia, for the agency.

John W. Whittlesey, Administrative Law Judge, pro se.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

FINAL DECISION AND ORDER

This case is before the Board on a Recommended Decision which finds that the Office of Hearing and Appeals (OHA), Social Security Administration (SSA), has shown good cause under 5 U.S.C. § 7521

to remove respondent John W. Whittlesey from his position as an administrative law judge (ALJ). For the reasons stated below, the Board ADOPTS the Recommended Decision AS MODIFIED herein.

BACKGROUND

The respondent, Judge John Whittlesey, is an ALJ assigned to the OHA office in White Plains, New York. on

November 13, 1992, the agency filed a complaint for disciplinary action against the respondent. The agency proposed to remove Judge Whittlesey on the basis of four charges of misconduct: 1) the unapproved outside practice of law in violation of agency rules of conduct; 2) violation of an agreement settling a previous complaint for disciplinary action; 3) disregard of duties by failure to comply with time and attendance requirements; and 4) misuse of the White Plains OHA and its employees in furtherance of private legal matters.

The case was assigned for adjudication to Judge Edward J. Reidy, the Board's Chief ALJ. The respondent moved to dismiss the complaint on various grounds, including that the notice of the charges failed to describe with particularity the facts supporting the proposed action, as required by 5 C.F.R. § 1201.133, that some charges constituted double jeopardy, and that certain allegations by the agency constituted a gross violation of confidentiality. Judge Reidy denied the motion, finding that the notice complied with the regulation and was fully adequate to inform the respondent of the nature and basis of the charges, that the respondent had not been previously charged with the acts of misconduct alleged by the agency, and that the complaint did not involve improper intrusion into matters confidential to the respondent. Administrative Record (AR), Tab 18.

A hearing was held in White Plains on February 2, 1993, at which both parties appeared, introduced evidence, and cross-examined the other. Following the submission of posthearing briefs, the Chief ALJ issued a Recommended Decision which sustained each of the charges in whole or in part, rejected respondent Whittlesey's affirmative defenses, and concluded that the agency had established good cause for its proposed action. Judge Reidy recommended that the Board authorize the agency to remove the respondent.

The respondent has filed numerous exceptions to the Recommended Decision, and the agency has submitted an answer.

ANALYSIS

1. The Chief ALJ correctly denied respondent's motion to dismiss.

Respondent Whittlesey contends that Judge Reidy's denial of his motion to dismiss without waiting for a response from the agency deprived the respondent of due process and violated 5 C.F.R. § 1201.41, the regulation setting forth the authority of judges in Board proceedings. We disagree. Nothing in the regulation or in fundamental notions of due process required the Chief ALJ to await a response by the agency before denying respondent's motion if the motion lacked merit or required him to grant such a motion on the ground that its arguments were not disputed. We also find, contrary to the respondent's contention, that Judge Reidy correctly denied respondent's request that his motion to dismiss be certified for interlocutory appeal because the motion did not raise an important question of law or policy and therefore did not meet the criteria for granting such requests. *See* 5 C.F.R. § 1201.92.

Respondent reiterates in his exceptions arguments which he advanced to the Chief ALJ in support of his motion to dismiss. According to Whittlesey, Charge II of the complaint is wholly lacking in the particularity required by 5 C.F.R. § 1201.133, and

therefore he contends that authorizing the agency's action on this basis would violate the rule that an action cannot be upheld on the basis of a charge which could have been, but was not, brought. *See Johnston v. Government Printing Office*, 5 M.S.P.R. 354 (1981). Charge II of the agency's complaint alleged that the respondent knowingly and willingly violated the terms of a May 1991 settlement agreement between the respondent and the agency which resolved a previous disciplinary action based on agency charges of unauthorized practice of law by the respondent. The complaint noted that in the agreement, which was approved by the Board, respondent Whittlesey accepted a 30-day suspension and agreed he would not engage in the practice of law,[1] except as required by his official duties, and would not conduct private business while at his official duty station or in official duty status. The complaint also stated that should the respondent violate the prohibition against the practice of law, that fact would be considered an aggravating circumstance in any resulting disciplinary action.

Respondent contends that Charge II of the complaint fails to comply with section 1201.133 because it does not describe in detail the respondent's actions constituting practice of law which have violated the terms of the agreement. However, Charge I of the complaint alleges that respondent has engaged in the unauthorized practice of law in violation of agency rules of conduct and specifies the facts underlying this charge. The respondent's argument is based on the fallacious premise that each paragraph of the complaint must be read in isolation. Administrative pleadings are liberally construed, and we find that Charge I adequately sets forth the instances which give particularity to Charge II. Charge II asserts that

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[1] The settlement defined "practice of law" to include any formal or informal representation for purposes of giving legal advice or counsel or participation in any professional capacity in any legal action or proceeding in any forum. AR, Tab 12, Exhibit A-14 at 2.

these instances violate the settlement agreement as well as the agency's rules and that under the agreement its violation is an aggravating circumstance in any resulting disciplinary action for unauthorized practice of law. As Judge Reidy correctly found, the respondent was aware of the instances charged, and he defended against them.

According to the respondent, Judge Reidy misunderstood the "double jeopardy" claim which he advanced in his motion to dismiss, i.e., that the agency's charges violate the principle that an agency may not take disciplinary action against an employee for the same offense which was previously the basis for discipline. *See*, e.g., *Littlejohn v. U.S. Postal Service*, 25 M.S.P.R. 478, 481 (1984). The respondent's theory is that, because the agency placed him in AWOL status during times of unauthorized absence and made corresponding deductions from his pay, the agency is barred from relying on these instances of unauthorized absence in its adverse action. However, as Judge Reidy ruled, placement in AWOL status for pay purposes is not a disciplinary action. Rather, it is a purely remedial action taken to avoid compensating an employee for time not worked. Unexcused failure to report for duty is an offense against the employment relationship and distinct in concept from limiting compensation to hours worked. *Cf. United States v. Furlett*, 974 F. 2d 839, 843-44 (7th Cir. 1992) (civil monetary penalty which compensates government for its loss due to individual's misconduct is remedial, not punitive, and Double Jeopardy Clause does not bar subsequent criminal prosecution for the same misconduct).[2]

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[2] Respondent also claims that the deductions from his pay for times when he was AWOL resulted in violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, because it converted him from an exempt, salaried employee to a non-exempt employee entitled to overtime pay which he did not receive. The respondent cites no authority for this theory, which we reject, and in any event

2. The agency proved its charges that the respondent violated agency rules and a settlement agreement by engaging in unauthorized practice of law.

The respondent's fundamental contentions are that the agency failed to prove its case against him and that the Chief ALJ sustained the charges because he erroneously shifted the burden of proof to respondent and relied on inadmissible and incredible evidence. Respondent challenges the evidence relied on in Judge Reidy's ruling sustaining Charge I, alleging that Whittlesey willfully engaged in the outside practice of law without the agency's approval and in violation of rules barring such activity. Judge Reidy found that the agency proved three specifications under this charge: C) that on September 9, 1992, respondent appeared and served as attorney and advocate for Vincent Cacciola in his case before the New York State Workers' Compensation Board; D) that on or about September 21, 1992, respondent appeared and served as attorney and advocate for Veronica Spuehler in *Spuehler v. Pepsi*, a wrongful termination proceeding in an unidentified forum, and that respondent's participation in the case was of longer duration than the September 21 hearing; and E) that on September 24, 1992, respondent appeared and served as attorney and advocate for William Terry in his case before the New York State Workers' Compensation Board.

According to the respondent, the Chief ALJ incorrectly sustained Charge I on the basis of hearsay because this evidence, subjected to the scrutiny required by the Board's decisions, was of insufficient weight to meet the agency's burden of proof. However, the evidence which established specifications C) and E) consisted of certified copies of two workers' compensation case files. AR, Tab 19,

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the record is devoid of evidence that respondent ever worked more than 40 hours a week. Moreover, even if his argument were correct, it would not be a defense to the agency's charges.

Exhibits A-34 & A-35. These documents, as evidence of the dates of the proceedings and the names of the participants, fall within the exception to the hearsay rule for records of the proceedings of a public agency like the New York State Workers' Compensation Board. *See* Fed. R. Evid. 803(8). *Cf. United States v. Arias*, 575 F.2d 253, 254 & n.1 (9th Cir.), *cert. denied*, 439 U.S. 868 (1978) (trial transcript admissible, not to prove truth of testimony, but to show by court reporter's recorded observations that testimony was given under oath). Under this exception, the hearing reporter's recorded statements are competent and unrebutted evidence that respondent appeared as the claimants' representative at the hearings in their cases.[3] Further, the case files also include statements signed by the respondent indicating that he was the claimant's representative and that his services were provided for compensation. Exhibit A-34 at 182, 194; Exhibit A-35 at 296-298. Such admissions are not hearsay. *See* Fed. R. Evid. 801(d)(2). We reject respondent's evidentiary challenge to the findings sustaining specifications C) & E) of Charge I.

For proof of specification D) of Charge I, the agency relied on a document, AR, Tab 12, Exhibit A-10, together with testimony concerning the circumstances of its receipt by Judge Harap, the White Plains Hearing Office's Chief ALJ. The document was a handwritten memo from Veronica Spuehler to Whittlesey which indicates that respondent was Spuehler's representative in a case involving her termination from employment by Pepsi.[4] Whittlesey

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3 Letters to Judge Bernstein (OHA Regional Chief ALJ) from the Director of the Claims Bureau, AR, Tab 12, Exhibits A-9 & A-11, also confirmed that respondent appeared on September 9 and 24, 1992, as alleged in Specifications C & E. No reason was offered to question the authenticity of this corroborative evidence. Although hearsay, such evidence is admissible in administrative proceedings. *See Richardson v. Perales*, 402 U.S. 389, 410 (1971).

4 We see no merit in respondent's objection that Spuehler's memo does not

contends that, because this hearsay evidence was not sworn and it was not shown that the witness was unavailable to testify, it must be discounted and is therefore insufficient to establish the charge. However, the determination of whether hearsay alone is sufficient to sustain a charge depends on its reliability and trustworthiness. *Paniagua v. General Services Administration*, 23 M.S.P.R. 229, 232 (1984). While a sworn statement has greater weight than one that is not, and live testimony is more probative than an out-of-court statement, respondent is mistaken in contending that hearsay evidence has no evidentiary weight if it is not sworn and if it is not shown that the declarant was unavailable to testify. Rather, the probative value of the agency's evidence must be evaluated in terms of the factors set forth in *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 87 (1981).

Spuehler's handwritten memo to respondent, dated September 21, 1992, discusses settlement of her employment discrimination claim against Pepsi, comments on "today's hearing," and states Spuehler's belief that, if Pepsi is not interested in settlement, "we should move to the next step which as I understand it is a public hearing." AR, Tab 12, Exhibit A-10 at 24. In addressing respondent concerning these matters and referring to his involvement, Spuehler is a disinterested witness without any apparent relationship to, or even awareness of, the agency's investigation of respondent. There is no reason to doubt her credibility concerning respondent's relationship to her pursuit of her claim.

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explicitly state that he is her representative. He offers no alternative explanation for statements which plainly imply such a relationship, such as Spuehler's comment that "[t]here have been a number of memos (and phone calls, etc.) between you and I, you and the state human rights division, the state human rights division and I—wherein both you and I have requested a hearing/discussion be held as soon as possible." AR, Tab 12, Exhibit A-10 at 18.

While no evidence directly corroborates the indicated role of respondent as her representative, no evidence contradict what the memo reflects. The document indicating that Spuehler regarded Whittlesey as her representative and advocate in a legal proceeding is internally consistent on this point, and the unauthorized practice of law by respondent which it indicates is consistent with the conduct in specifications C & E of Charge I which the agency proved. Properly evaluated, we find the memo is at least sufficient to establish prima facie that respondent was acting as Spuehler's legal representative. Since respondent offered no rebuttal evidence concerning the memo, we agree with Judge Reidy that the agency proved specification D of Charge I. We also agree that the three sustained specifications are sufficient to establish respondent's unapproved practice of law as alleged in Charge I.[5]

With respect to Charge II, that respondent willfully and knowingly practiced law in violation of the parties' May 1991 settlement agreement, Whittlesey contends that Judge Reidy's reliance on Regional Chief Administrative Law Judge Bernstein's testimony was clear error. Bernstein testified that respondent, when confronted with his continuing practice of law, at first denied it, but then admitted that he was handling workers' compensation cases "left over" from before the settlement for which he could not obtain other counsel. He stated he felt a responsibility to continue, according to Bernstein, and did not indicate that he would stop. Although Whittlesey denied these admissions, Judge Reidy credited Bernstein's testimony, citing his demeanor, his detailed recitation

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5 Whittlesey objects that his conduct alleged in Charge I was too isolated to meet the definition of "practice" as "habitual or customary performance." However, his conduct fits the applicable dictionary definition, "the exercise of a profession or occupation," *see* Webster's Third New International Dictionary 1780 (1976), as well as the definition of "practice of law" contained in the parties' 1991 settlement agreement, *see* note 1, *supra*.

of facts, the presence of others during the conversation, and his lack of anything to gain through false testimony. In contrast, Judge Reidy noted respondent's motive to falsify in order to save his job and his attempted deception with respect to time and attendance. Recommended Decision, AR, Tab 23, at 16-17. In support or his assertion that Bernstein lacked credibility, respondent suggests that Bernstein had a motive to falsify as the instigator of the charges and as allegedly guilty of age discrimination. However, Bernstein's personal interest was less than respondent's, and we reject the age discrimination allegation, *see infra*. Respondent has identified no internal inconsistencies or inherent improbabilities in Bernstein's testimony or any contradictory evidence from independent witnesses. Moreover, special deference must be given to the fact-finder's credibility determinations which are based on the demeanor of witnesses. *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985). We reject respondent's evidentiary challenge to Judge Reidy's ruling sustaining Charge II.

3. The agency met its burden of proof on the charge that the respondent willfully failed to comply with time and attendance requirements.

The respondent's argument concerning misallocation of the burden of proof is raised in connection with Charge III, alleging that he neglected his duties by being absent during work hours without authorization. Judge Reidy sustained nine specifications of unauthorized absence from duty and falsification of the attendance register. Respondent does not deny the absences during work hours found by Judge Reidy, but he contends that the agency did not meet its burden of proof because its evidence failed to show that he was not conducting agency business during his absences from the office. Whittlesey suggests that there are many possible legitimate reasons for absence from the office, such as library research, reviewing files in other OHA offices, and discussions off-premises with SSA claimants' attorneys. However, respondent has not contended that

he requested or received approval to conduct business away from his official duty station. Such approval is implicitly required by the agency's rule requiring him to work an eight-hour day and to record his comings and goings on a register. The employer is entitled to have employees in attendance when they are expected to be, absent a valid excuse. *Davis v. Veterans Administration*, 792 F.2d 1111, 1113 (Fed. Cir. 1986). Where absence during work hours is shown, the employee has the burden to show that he had authorization to be out of the office. Respondent presented no evidence that he was authorized to conduct business out of the office during his work hours or that he was engaged in agency business during his absences. We find that Judge Reidy did not improperly shift the burden of proof and that he correctly sustained Charge III.

4. The agency's evidence was insufficient to prove the charge of misuse of OHA and its employees.

Judge Reidy sustained two specifications of Charge IV, that respondent misused the OHA and its employees in furtherance of private legal matters. He sustained specification A, that the receptionist took messages on July 23, 1991 from two individuals who called respondent at the White Plains OHA office concerning legal matters (job injury cases) unrelated to respondent's official duties, and specification B, that on September 22, 1992, an unnamed woman visited the White Plains office and left a folder for respondent containing legal documents unrelated to SSA business. Respondent objects that there is no evidence that he solicited the calls or the visit. We agree that this evidence is insufficient to support an inference that respondent authorized the callers to telephone or visit him at the office or gave them the address or telephone number. An individual who was aware of respondent's employment its address and telephone number. Accordingly, we do not sustain Charge IV.

5. The respondent failed to prove his affirmative defenses.

In his exceptions, Whittlesey contends that the Chief ALJ erred in rejecting his affirmative defenses. Respondent also challenges Judge Reidy's rejection of his claim that his affirmative defenses should be deemed admitted because the agency failed to answer them. Judge Reidy correctly rejected this contention. The regulation on which respondent relies, 5 C.F.R. § 1201.125, provides that if a party named in a complaint fails to answer its allegation, default against the party may result. The regulation has no application to affirmative defenses.

In answer to the charges that he violated agency rules by engaging in the practice of law, respondent asserts that the agency's prohibition violates his First Amendment rights to freedom of speech and association. Whittlesey does not claim that there is a First Amendment right to practice law in violation of applicable rules, but he contends that, because speech is involved in the practice of law, under *National Treasury Employees Union (NTEU) v. United States*, 990 F.2d 1271 (D.C. Cir.), *reh' g en banc denied*, 3 F.3d 1555 (1993), the government may not constitutionally prohibit him from practicing law and representing clients in matters unrelated to his work or function. In NTEU the court found that section 501(b) of the Ethics in Government Act, banning federal employees from receiving honoraria for off-duty appearances, speeches or articles, violated the First Amendment as it applied to executive branch employees. The court held that the statutory prohibition was unconstitutionally overbroad because it was not limited to employees's' receipt of payments where there was some nexus between the employee's job and either the subject matter of the expression or the character of the payor. *Id.* at 1275.

The *NTEU* decision does not support respondent's argument because there is a nexus between the practice of law and the position of a judicial officer like the respondent.[6] This connection is recognized by the American Bar Association (ABA) Code of Judicial Conduct which provides in Section 4G that, except when he or she is acting pro se or advising family members without compensation, "[a] judge shall not practice law." The Board has previously found that the ABA Code is an appropriate guide for evaluating the conduct of administrative law judges. *Matter of Chocallo,* 1 M.S.P.R. 612, 652-53 (1978). The SSA Guide on Employee Conduct parallels this prohibition in Part VII, Section I," "Restrictions Applying to Administrative Law Judges." As the Guide explains, an appearance of impropriety and, in many cases, of conflict of interest is created when an individual acts as an advocate in disputes between parties who may later appear before the individual acting as an ALJ. AR, Tab 12, Exhibit A-2 at 5-6. We also agree with the agency that the prohibition is appropriate as a method of preventing collateral misuse of position and distraction from official duties. Respondent has shown no violation of his First Amendment rights.

Whittlesey also asserts that Judge Reidy erred in not excluding evidence which respondent alleges that the agency obtained by intruding into confidential matters in violation of his constitutional right to privacy. Assuming without deciding that evidence so obtained should be excluded,[7] we find no violation of respondent's

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[6] In *NTEU* the court recognized that the honoraria ban could have legitimately been applied to some executive branch employees, 990 F.2d at 1275, and it excluded legislative and judicial employees from its holding, noting that any claim of unconstitutionality as to such employees would raise quite different considerations. *Id.* at 1278.

[7] *Cf. Special Counsel v. Russell,* 32 M.S.P.R. 115, 123 (1987) (leaving undecided whether rules aimed at insuring protection of constitutional rights during

rights. Whittlesey contends that Hearing Office Chief ALJ Harap violated both his privacy rights and professional ethics when he read the "Spuehler v. Pepsi" memorandum addressed to respondent. In support of this contention, he cites an ABA ethics opinion stating that a lawyer should not examine materials which appear subject to the attorney-client privilege are received under circumstances which clearly indicate that the lawyer was not intended to receive them. In the first place, as Judge Reidy noted, respondent's contention that the memo was protected by the attorney-client privilege is an admission of the agency's practica-of-law charge based on the memo, and this admission would support the charge even if the memo were excluded. Moreover, it is generally recognized that the privilege in question is the client's and the clients's alone. In *McCormick of Evidence*, § 92 at 339 (4th ed. 1992). To the extent privacy considerations have been cited as a supporting rationale for the privilege, *see id.*, § 87 at 315-16 & n. 10, the reference is to the privacy interests of the client, not attorney. Thus, even if infringement of the privilege were determined to have occurred,[8]

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criminal investigations apply in Board proceedings). *But see Delk v. Department of Interior*, 57 M.S.P.R. 528 (1993) (exclusionary rule does not bar agency use in Board proceding if evidence illegally seized by law enforcement officers for use in a criminal proceeding).

[8] Respondent challenges Judge Reidy's finding that the client, by handing the memo to Judge Harap, destroyed the confidentiality of the communication and thereby waived the privilege. AR, Tab 23, at 12 n.4. As to whether Harap had reason to know the memo was confidential, the record does not disclose what was said at the time it was handed to him. Although respondent offered no evidence besides speculation concerning the transmittal of the memo, *see* Hearing Transcript (HT) 298, 306, he was arguably prevented from cross-examining Harap on this point because he was not permitted to question him on the subject of attorney-client privilege. HT at 145-46. Since we have found no right of respondent's was violated, we need not resolve the issue of whether the memo was protected by the privilege.

we see no basis for finding it violated any privacy right of the respondent.[9]

Respondent also claims that Judge Reidy erred in finding there was no evidence whatsoever to support his claim that the agency's action constituted age discrimination. He relies on the agency's lack of a program to recruit older employees, but he has cited no authority for his apparent belief that the agency was required to recruit older persons or any reasonable basis for linking the agency's recruitment policies to his case. Respondent also alleges an attempt by supervisory ALJ's to coerce his resignation. He testified that during a November 9, 1992, meeting Judges Anglada and Bernstein indicated that his age was 75, that resignation would be an alternative to removal, and that if he did not resign, he might lose his pension. HT at 293. When the respondent cross-examined Judge Bernstein, respondent did not ask him whether he or Judge Anglada made these statements during the November 9, 1992 meeting. Respondent asked him only whether either of them had asked the respondent's age at the meeting, a question which Bernstein answered in the negative. HT at 80. We do not think that respondent's evidence amounts to attempted coercion. The supervisors' comments to which he testified are certainly insufficient to constitute a prima facie case of age discrimination. In view of his admitted absence during duty hours and unapproved outside practice of law, respondent has not shown an essential element of a prima facie case, that his performance of his duties met the agency's legitimate expectations. *Mesnick v. General Electric Co.*, 950 F.2d 816, 823 (1st Cir. 1991),

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9 The respondent also alleges that a violation of his privacy rights occurred when agency personnel who received telephone calls for him which appeared to reflect his outside practice of law made a record of the source and subject of the calls. We have not sustained the agency's charges based on these calls, but we find that the agency was entitled to keep such records as possible evidence that respondent was continuing to violate agency rules of conduct.

cert. denied, 112 S. Ct. 2965 (1992). In any event, the agency's evidence in support of its charges would rebut a prima facie case of discrimination because it establishes a lawful, nondiscriminatory reason for its decision to propose respondent's removal. *See id.* Respondent has not shown that the agency's charges were pretextual. We find that Judge Reidy properly rejected the respondent's age discrimination claim.

We also reject respondent's contention that Judge Reidy erred in finding that respondent's assertion of disparate treatment was not substantiated. In support of his claim that others went unpunished for time and attendance violations comparable to his own, respondent cites the testimony of Judith Briggs, the White Plains Hearing Office Manager. However, Briggs testified to isolated and inadvertent attendance violations by other employees of the White Plains OHA. HT at 224-226. These infractions fall far short of Whittlesey's repeated failures to observe time and attendance requirements and his falsifications of the attendance roster, as found by Judge Reidy. We agree with the Chief ALJ that respondent has not shown that others similarly situated were treated more leniently.

Finally, Whittlesey alleges that Judge Reidy's decision was the product of bias and prejudice against him. Respondent advances fifteen grounds for this allegation consisting of various rulings and actions taken by the Board's Chief ALJ during the course of this proceeding. We have examined respondent's numerous assertions in support of this contention and find that he has failed to overcome the presumption of honesty and integrity which accompanies administrative adjudicators. *See Matter of King,* 1 M.S.P.R. 146, 151 (1979).

In his exceptions, respondent Whittlesey has not challenged Judge Reidy's determination that, in light of the sustained charges, the penalty of removal proposed by the agency is appropriate. We have modified the Chief ALJ's recommendation by not sustaining Charge IV, but we find that this modification does not affect the

correctness of Judge Reidy's analysis of the penalty factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). This proceeding is the second disciplinary action against the respondent for unauthorized practice of law in two years. The earlier action was resolved by a settlement in which respondent agreed not to contest the factual allegations, accepted a 30-day suspension and promised not to practice law while an ALJ. The respondent has not only broken this promise, but he has shown a lack of integrity by falsifying time and attendance records and lying to a superior to cover up his continued practice of law. This misconduct alone would warrant his removal from a position of authority and trust. As Judge Reidy found, honesty and integrity are essential attributes of an ALJ. Although the agency concedes the appellant's work product was satisfactory and timely, his misconduct has been repeated, and there is no reason to anticipate his rehabilitation. We agree with the Chief ALJ that respondent's retention in light of the serious nature of his misbehavior would erode public confidence in the administrative law system.

Accordingly, the Board finds that the agency has shown good cause to take the proposed action, and we hereby AUTHORIZE the agency to remove the respondent.

NOTICE TO RESPONDENT

You have the right to request further review of the Board's final decision in your case.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt o this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert Taylor/signature
Robert Taylor
Clerk of the Board
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this OPINION AND ORDER was sent today by certified mail to:

Honorable John W. Whittlesey
Administrative Law Judge
310 Douglas Road
Chappaqua, NY 10514

By regular mail to:

Donald Przybylinski, Esq.
Sarah A.L. Humphreys, Esq.
Social Security Administration Office of
Hearings and Appeals
One Skyline Tower, Suite 1702

5107 Leesburg Pike
Falls Church, VA 22041

Ms. Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, NW., Room 7412
Washington, DC 20415

Office of Special Counsel
1730 M Street, NW., Suite 300
Washington, DC 20036-4505

by hand to:

Office of the Chief Administrative Law Judge
Merit Systems Protection Board
1120 Vermont Ave., NW., Suite 846
Washington, DC 20419

DEC 7 1993/stamp
(Date)

Robert Taylor/signature
Robert E. Taylor
Clerk of the Board
Washington, D.C.

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LOGO

DEPARTMENT OF HEALTH & HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Refer to:
Office of Hearings and Appeals
P.O. Box 3200
Arlington, VA 22203

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MSPB - MAILROOM/stamp

November 10, 1992

Mr. Robert E. Taylor, Clerk
Office of the Clerk of the Board
Merit Systems Protection Board
Suite 802
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

Dear Mr. Taylor:

The Office of Hearings and Appeals, Social Security Administration (OHA or agency) proposes to remove John W. Whittlesey, an Administrative Law Judge (ALJ) appointed under 5 U.S.C. § 3105 and employed in OHA's White Plains, New York Hearing Office. In accordance with 5 U.S.C. § 7521 and the regulations promulgated pursuant thereto, this matter is referred to the Merit Systems Protection Board to determine if there is good

cause for removing A W Whittlesey from his position. The charges against the employee are as follows:

CHARGE I

From July 23, 1991 through September 24, 1992, and possibly longer, Respondent has acted as an attorney and advocate, representing parties before the New York State Workers' Compensation Board and in other private legal matters unrelated to his official Government duties and responsibilities. Respondent has knowingly and willfully engaged in the outside practice of law without the agency's approval and in violation of the regulations pertaining to outside activities and the restrictions applying to ALJs, published respectively in the Department of Health and Human Services' Standards of Conduct (45 C.F.R. §§ 73.735-701, .735-704, .735-708) and the Social Security Administration's Guide on Employee Conduct (Part VII, § I).

In addition to violating the agency's published and binding rules of conduct, Respondent's actions breach fundamental standards of professional behavior and reflect adversely upon his judicial fitness. His outside practice of law creates the appearance, if not the fact, of conflict of interest. Further, his disregard of ethical considerations tends to erode public confidence in the integrity of the administrative adjudicative process.

PARTICULARS

Respondent has acted as an attorney and advocate for three known clients in matters not related to his official duties and responsibilities as an ALJ for the Office of Hearings and Appeals. Further, Respondent's conduct at his official duty station and in public leads to the conclusion that his private legal practice is more extensive even than alleged herein. Among other possible instances of the unapproved outside practice of law, Respondent has acted as

attorney and advocate, or has held himself out to the public as an attorney and advocate, as follows:

A. On July 23, 1991, a White Plains Hearing Office receptionist received two telephone messages for Respondent. The first message, taken at 11:14 a.m., was from an individual named Dan Mena, who stated he was calling on a "personal case" regarding a job injury. The second caller, at 12:20 p.m., was an individual named Laverne Dabbs, who left a message transcribed as "Ref: *Worker's Comp Injury* 1989 sent Paper to you on Monday 7-22-91." This contact from Ms. Dabbs was apparently a continuation of a legal relationship between Respondent and Ms. Dabbs that has existed at least since February 1991.

B. Respondent's name was included on the faculty list for a one-day seminar entitled "OSHA Compliance in New York," scheduled on May 6, 1992 in White Plains, New York, sponsored by the National Business Institute, Inc. The accompanying biographical information stated that "John Whittlesey is of counsel to the White Plains law firm of Keane & Beane, P.C., where his practice focuses in the areas of labor law, workers' compensation, pension and profit sharing and employee benefits."

C. On September 9, 1992, Respondent appeared and served as attorney and advocate for an individual named Vincent Cacciola in Case No. WCB 0895 1867 before the New York State Workers' Compensation Board in Spring Valley, New York.

D. On or about September 21, 1992, Respondent served as attorney and advocate in a proceeding in an unidentified forum for an individual named Veronica Spuehler in a matter entitled *Spuehler v. Pepsi*, in which Ms. Spuehler was alleging unjustified termination of employment by Pepsi. Respondent's participation in the *Spuehler*

v. Pepsi matter appears, however, to be of longer duration than just an appearance at the September 21 hearing .

E. On September 24, 1992, Respondent appeared and served as attorney and advocate for an individual named William Terry in Case No. WCB 0872 6132 before the New York State Workers' Compensation Board in Yonkers, New York.

CHARGE II

Respondent willfully and knowingly violated the provisions of the Settlement Agreement in the matter of the *Social Security Administration v. Whittlesey,* Docket No. HQ75219110008, into which he had voluntarily entered with the agency, and which the Merit Systems Protection Board accepted in its Opinion and Order of August 22, 1991. In that matter, Respondent specifically agreed as a condition for settlement that, henceforth, he would not engage in the outside practice of law, or conduct private business either while at his official duty station or when on official duty status.

Respondent's willful and knowing violation of the Settlement Agreement reflects adversely on his honesty and integrity, and calls into question his credibility, judicial fitness and suitability to hold a position of trust. His behavior before both the agency and the Board demonstrates bad character.

PARTICULARS

A. On April 10, 1991, OHA filed with the Merit Systems Protection Board (Board) a charge letter requesting that the Board find good cause to remove John W. Whittlesey from his position as an Administrative Law Judge appointed under 5 U.S.C. § 3105. The letter contained the following three charges:

> 1. In Charge I, the agency alleged that Respondent had willfully and knowingly engaged in the outside

practice of law without the agency's approval and in violation of agency regulation pertaining to outside activities and the restrictions applying to ALJs.

2. In Charge II, the agency charged Respondent with insubordination for willfully and intentionally disregarding reasonable and legitimate supervisory directives that he must not engage in any private law practice while holding an appointment as an ALJ.

3. In Charge III, the agency asserted that Respondent knowingly and willfully conducted private business at his official duty station, using Government office space and telephones for other than officially approved activities.

B. On May 29, 1991, Respondent and the agency voluntarily entered into a Settlement Agreement, signed by both parties, in which Respondent agreed to the following:

1. Not to contest the jurisdiction of the Merit Systems Protection Board or the factual representations set forth in the Charges and Particulars;

2. Not to engage in the practice of law except as required by his official duties, and not conduct private business at his official duty station or when in official duty status;

3. Not to contest a suspension of thirty calendar days without pay from his position as ALJ; and

4. In the event that Respondent violated the prohibition against engaging in the practice of law, that fact would be considered an aggravating circumstance in any resulting disciplinary action.

C. In a May 31, 1991 Recommended Decision, Chief Administrative Law Judge Edward J. Reidy found that the Settlement Agreement should be approved by the Board. On August 22, 1991, the Board issued its Opinion and Order adopting the Recommended Decision as modified in the Opinion. The Board found good cause for discipline and authorized the agency to impose the penalty of a thirty-day suspension, which Respondent had agreed to accept. The Respondent subsequently served a thirty-day suspension.

CHARGE III

Respondent, who is employed in a full-time capacity as an ALJ, demonstrated willful disregard and neglect of the duties and responsibilities of his position by his failure to comply with time and attendance requirements. As a regular, full time employee of the Federal Government, he is obliged to work a regularly scheduled administrative workweek, consisting of a 40-hour basic workweek. Respondent's work schedule for a basic workweek consists of a non-overtime workday, not exceeding eight hours, performed Monday through Friday. On at least nine separate occasions, however, Respondent did not work a full eight-hour tour of duty, nor did he request or receive approved leave for the time he was absent from his official duty station.

Respondent's failure to abide by time and attendance requirements, and his unauthorized absence from his duty station without leave, adversely affect Government operations and the agency's ability to effectively perform its mission. Further, Respondent's conduct and apparent willful disregard for statutory provisions governing his employment raise the question of his suitability to hold a position of trust and responsibility.

PARTICULARS

A. On July 29, 1991, Respondent registered an arrival time of 8:00 a.m. on the White Plains Hearing Office Time and Attendance Roster. At 3:15 p.m. Respondent left the hearing office for the day but did not record his departure time on the Roster. On July 31, 1991, however, Respondent entered a departure time of 4:30 p.m. for July 29 on the Roster. Because management had observed him leaving the office at 3:15 p.m. on July 29, it was evident that Respondent had not worked a full eight hour tour of duty and had fraudulently entered an inaccurate departure time for July 29. Since Respondent did not have any official Government business away from the hearing office on July 29, and since he did not request or receive approved leave for his absence from the office, the agency placed him on Absent Without Leave status on July 29, 1991.

B. On August 27, 1991, Respondent entered an arrival time of 8:15 a.m. on the White Plains Hearing Office Time and Attendance Roster. At 1:30 p.m. Respondent left the hearing office and did not return for the remainder of the day. Since Respondent did not have any official Government business away from the hearing office on August 27, and since he did not request or receive approved leave for the remainder of the eight hour tour of duty he was expected to work in the hearing office, Respondent was absent without leave from his duty station on August 27, 1991.

C. On August 28, 1991, Respondent arrived at the White Plains Hearing Office at approximately noon and worked at his duty station no more than four and one-half (4 1/2) hours. He did not sign in or out on the Time and Attendance Roster for that date. Since Respondent did not have any official Government business away from the hearing office on August 28, and since he did not request or receive approved leave for the remainder of the eight hour tour

of duty he was expected to work in the hearing office, Respondent was absent without leave from his duty station on August 28, 1991.

D. On September 10, 1991, Respondent arrived at the White Plains Hearing Office at 9:00 a.m., but recorded an arrival time of 8:15 a.m. At 4:05 p.m. Respondent left the hearing office for the day, but posted a departure time of 4:45 p.m. By fraudulently recording his arrival and departure times, Respondent falsely represented that he was present at his duty station and had worked an eight hour tour of duty. Respondent's absence from the office between 8:15 and 9:00 a.m. and again between 4:05 and 4:45 p.m., however, meant he could not have worked a full eight hours. Since Respondent did not have any official Government business away from the hearing office on September 10, and since he did not request or receive approved leave for the remainder of the eight hour tour of duty he was expected to work in the hearing office, the agency placed him on Absent Without Leave status on September 10, 1991.

E. On September 16, 1991, Respondent arrived at the White Plains Hearing Office at approximately 11:30 a.m. and worked at his duty station no more than five (5) hours. He did not sign in or out on the Time and Attendance Roster for that date. Since Respondent did not have any official Government business away from the hearing office on September 16, and since he did not request or receive approved leave for the remainder of the eight hour tour of duty he was expected to work in the hearing office, the agency placed him on Absent Without Leave status on September 16, 1991.

F. On September 18, 1991, Respondent arrived at the White Plains Hearing Office at 9:05 a.m., but recorded an arrival time of 8:30 a.m. At 4:30 p.m. Respondent left the hearing office for the day, but posted a departure time of 5:00 p.m. By fraudulently recording his arrival and departure times, Respondent falsely represented that he was present at his duty station and had worked an eight hour tour of duty. Respondent's absence from the office

between 8:30 and 9:05 a.m. and again between 4:30 and 5:00 p.m., however, meant he could not have worked a full eight hours. Since Respondent did not have any official Government business away from the hearing office on September 18, and since he did not request or receive approved leave for the remainder of the eight hour tour of duty h was expected to work in the hearing office, the agency placed him on Absent Without Leave status on September 18, 1991.

G. On September 9, 1992, Respondent posted an arrival time of 9:15 a.m. and a departure time of 5:45 p.m. on the White Plains Hearing Office Time and Attendance Roster, certifying that he was present at his duty station and had worked an eight hour tour of duty. On that same date, however, Respondent represented Vincent Cacciola in a hearing before the New York State Workers' Compensation Board in Spring Valley, New York. Based upon the distance involved and the time required for a workers' compensation hearing, Respondent could not have represented a client before the Workers' Compensation Board during his one-half (½) hour lunch break. Therefore, Respondent could not have worked a full eight hour tour of duty, as he falsely represented on the Time and Attendance Roster. Since Respondent did not request or receive approved leave for his absence from the office, Respondent was absent without leave from his duty station on September 9, 1992 for an undetermined amount of time.

H. On September 24, 1992, Respondent recorded an arrival time of 8:10 a.m. on the Time and Attendance Roster. At some unknown time during the day, Respondent left the hearing office to represent William Terry in a 1:00 p.m. hearing before the New York State Workers' Compensation Board in Yonkers, New York. Respondent did not return to his duty station at the White Plains Hearing Office for the remainder of September 24. Therefore, Respondent did not work a full eight hour tour of duty. Since Respondent did not request or receive approved leave for his absence from the office,

Respondent was absent without leave from his duty station on September 24, 1992 for an undetermined amount of time.

I. On September 25, 1992, Respondent registered an arrival time of 7:30 a.m. on the Time and Attendance Roster. At the same time, he fraudulently entered a departure time of 4:45 p.m. for September 24, 1992, despite the fact he had not returned to the office on that day following his earlier departure to attend a 1:00 p.m. workers' compensation hearing. Further, after signing the Roster the morning of September 25, Respondent left his duty station, although he had no official Government business away from the hearing office. Respondent did not return to his duty station until approximately noon on the same day. On Respondent's final departure from the office on September 25, he recorded a departure time of 4:00 p.m. on the Roster. By failing to record his absence during duty hours, Respondent falsely represented that he was present at his duty station and had worked an eight hour tour of duty. Respondent's absence from the office between approximately 7:30 a.m. and 12:00 p.m., however, meant he could not have worked a full eight hours. Since Respondent did no request or receive approved leave for his absence from the office, he was absent without leave from his duty station on September 25, 1992.

CHARGE IV

Respondent has knowingly and willfully used the White Plains Hearing Office and Government employees in that office in furtherance of private legal matters unrelated to Respondent's official Government duties and responsibilities. Furthermore, Respondent has knowingly and willfully used Government owned or leased photocopy machines and has authorized private legal clients to use Government leased telephone lines in order to contact him for other than officially approved activities.

Respondent's conduct is in violation of the regulations pertaining to use of Government property, use of public office for private gain, impeding Government efficiency or economy, and adversely affecting the confidence of the public in the integrity of the Government, as set forth by the Department of Health and Human Services' Standards of Conduct (45 C.F.R. §§ 73.735-101, .735-304, .735-508(a), (c), (f)).

Respondent's use of the White Plains Hearing Office and Government employees and equipment in that office in furtherance of his private legal business constitutes neglect of his responsibilities as an ALJ, and disrupts the efficient and orderly operation of the office and the work of its staff. Further, Respondent's conduct and apparent willful disregard for the regulatory provisions governing his employment raise the question of Respondent's judicial fitness and suitability to hold a position demanding integrity and the exercise of sound judgment.

PARTICULARS

A. In July 23, 1991, a White Plains Hearing Office receptionist took two telephone messages for Respondent, as described previously in Charge I. In both instances, the caller were attempting to reach Respondent on legal matters unrelated to any claim, proceeding or duty within Respondent's official job responsibilities.

B. On September 22, 1992, a woman who did not identify herself approached OHA employee Julia James at the receptionist's desk of the White Plain Hearing Office and handed her a folder labeled "Spuehler vs. Pepsi." The unidentified woman told Ms. James that the folder was for Judge Whittlesey. Review of the folder's contents revealed that it contained documents pertaining to a legal matter

unrelated to any claim, proceeding or duty within Respondent's official job responsibilities.

C. Also on September 22, 1992, Judge Harap observed Respondent use a Government photocopy machine to copy the documents contained in the folder labeled "Spuehler vs. Pepsi," which were unrelated to any claim, proceeding or duty within Respondent's official job responsibilities.

This letter initiating disciplinary proceedings against Administrative Law Judge John W. Whittlesey is submitted for your action pursuant to 5 C.F.R. §§ 1201.131-.136.

Respectfully submitted,

Daniel L. Skoler/signature
Daniel L. Skoler
Associate Commissioner

APPENDIX B

COMPLAINT PROCEDURES INITIATED BY AND AGAINST FEDERAL ADMINISTRATIVE LAW JUDGES NEED REFORM NOW

The Merit Systems Protection Board must provide due process protections to ALJs that are available to other federal employees

by Delbert R. Terrill, Jr.

The existing administrative adjudication process and the Merit Systems Protection Board (MSPB) procedures are insufficient, weak and otherwise ineffective in protecting ALJs independence from agency incursion. Many ALJs question the evenhandedness of the current procedure and structure of MSPB.

Although the Civil Service Reform act, passed over 15 years ago, offers disciplinary procedures for most federal employees, the MSPB has never issued any final regulations nor established any procedures for ALJs to seek protection under Title 5, § 7521. This section provides for the administrative adjudication of agency action involving ALJs.

With limited exceptions, the MSPB has jurisdiction over disciplinary actions affecting ALJs. 5 U.S.C. § 7521 (1979). As a result, no agency may take action until after an MSPB hearing and decision. Title 5, § 7521 states that "[a]n action may be taken against an administrative law judge... by (the employing agency) only for good cause established and determined by the Merit Systems Protection Board on the record after [an] opportunity for [a] hearing before the Board." Section 7521 requires the MSPB to review any agency action that is a removal, suspension, reduction in grade, reduction in pay, or a furlough of 30 days or less.

There are three exceptions. An agency may: (1) remove or suspend an ALJ, under 5 U.S.C. § 7532, in the interests of national security; (2) take action through a reduction in force, pursuant to 5 U.S.C. § 3502; or (3) invoke disciplinary measures affecting an ALJ pursuant to 5 U.S.C. § 1206, through actions initiated by a Special Counsel, before the MSPB has adjudicated the action.

Good Cause Standard. An agency may only remove or discipline an ALJ as described above for "good cause." Good cause intentionally was not defined by Congress. (*Social Sec. Admin. v. Goodman*, 19 M.S.P.R. 321, 325 (1984).)

Who Shall Hear. Under 5 U.S.C. §1205 (a)(1),[1] MSPB may delegate its "original jurisdiction" to hear cases involving ALJs to an MSPB ALJ to hear and render an initial decision. (*In the Matter of King*, 1 MSPB 144, 14546 (1979).) Further, at MSPB's request, the Office of Personnel Management (OPM) may assign a non-MSPB ALJ to hear a case and render a recommended decision involving another ALJ. (*Department of Commerce v. Dolan*, 39 M.S.P.R. 314, 315 & n.1 (1988).) (OPM assigned case to the chief administrative law judge of the National Labor Relations Board when the MSPB ALJ recused himself on grounds of close personal and professional relationship with respondent ALJ.) MSPB has also used its delegation authority to appoint "contract ALJs." (*See generally*, cases involving 1990 furloughs of ALJs at the Social Security Administration (SSA).)

MSPB Procedures for Handling § 7521 Hearings. Under the Administrative Procedure Act (APA), MSPB adjudications must provide ALJs with the same due process guarantees afforded any party under the APA, but the MSPB has not issued regulations fully

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[1] § 1205 (a)(1) establishes the MSPB's authority to hear, adjudicate or provide for the hearing or adjudication of all matters within the jurisdiction of the Board.

implementing 5 U.S.C. § 7521. Although the MSPB has applied its procedures (for non-ALJ federal employees faced with agency action) to hearings involving actions proposed by an agency against an ALJ (*see* 5 C.F.R. § 1201.131),[2] there are no MSPB regulations whatsoever setting forth any procedures for an ALJ to initiate MSPB review under § 7521 of an *agency* action. (*In re Doyle*, 29 M.S.P.R. 170, 173 (1985).) This dearth of procedures is in stark contrast to the well-developed, detailed procedures the MSPB has adopted for all other federal personnel actions it hears. (*see* 5 C.F.R. 1201, *et seq.*)

Agency Constructive Violations of § 7521. The MSPB will review allegations brought by an ALJ that an employing agency has improperly taken action without a hearing in violation of § 7521, but only when there is a "sufficiency of the allegations showing the challenged action has a pernicious effect on the complaining judge's qualified independence." This can amount to "constructively removing an administrative law judge by cumulative administrative actions or active intervention in a manner calculated to prevent the impartial exercise of his judicial functions." (*In re Perry*, 39 F.M.S.R. 446, 443 (1989), citing *In re Doyle*, 29 M.S.P.R. 170, 175 (1985). In *In re Perry*, 447-48, an ALJ was issued a written reprimand following disputes between him and agency over claim for travel expenses. *See also*, *Benton v. U.S.*, 488 F.2d 1017 (1973), as precluding indirect as well as direct actions against judge's status and independence.)

Thus, "the right of administrative judges to seek to invoke Board jurisdiction if their employing agencies have taken disciplinary action against them without complying with the provisions of 5 U.S.C. 7521" is established. Nevertheless, there are no procedures

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2 The application of non-ALJ procedures to ALJ cases was accomplished by cross-reference.

by which an ALJ may restrain an employing agency from implementing action before receiving his or her statutory right of hearing and an MSPB decision on the record.

ALJs who are dissatisfied with the appropriateness of management actions deemed to not have a "pernicious effect on the complaining judge's qualified independence" are directed by the MSPB to seek redress through the agency's 5 C.F.R. Part 771 grievance process. (*In re Perry* at 449 n.2.)

The intent of § 7521 to protect ALJs from attempts by employing agencies to undercut their independence may be threatened by a variety of subtle and not-so-subtle agency reactions. Such constructive violations under § 7521 might include a pattern of harassment regarding payment of travel vouchers, denial of training opportunities, discriminatory assignment of travel and caseload, or selection of venues that are cost-prohibitive to a particular party in contravention of an ALJ's earlier and different section. The latter was a basis for relief sought by ALJs at the Department of Interior. In the seven years since *Doyle*, however, MSPB has yet to find a single instance of such constructive violation in five separate claims by ALJs. In total, since the passage of the Civil Service Reform Act of 1978 creating the MSPB, 23 cases[3] involving administrative law judges have been substantially adjudicated before the board.

Instead of following the regular procedures for § 7521 complaints, however, the MSPB seemingly has crafted "special rules" to benefit agency actions whenever necessary. For example, the MSPB established "special rules" for dealing with the SSA's effort to furlough its 800 ALJs during the budget fiasco of 1990.[4] In

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[3] Two of the 22 cases reviewed involve more than one ALJ.

[4] The resultant *ad hoc* nature of the MSPB procedures are, in the opinion of the authors, at the center of the current problem.

two cases involving ALJs, *McKenna* and *Anvel*, the "special" rules that related to discovery, relevancy of evidence, and testimony were crafted to benefit the complaining agency by the then MSPB chief ALJ. These "special rules" were either adopted *sua sponte* by the then MSPB chief ALJ or after *ex parte* discussions with the agencies involved. The "moving targets" created by the MSPB in these cases must be addressed, even though there is a new chief judge at MSPB.

Requiring MSPB to publish proposed regulations for comment will afford ALJs the procedural safeguards now afforded all other non-ALJ federal employees.

Given the congressionally mandated degree of independence afforded agency ALJs by the APA, there will always be a normal dynamic tension between agencies and their ALJs. To ensure that the balance of such tension is not improperly tipped in favor of an agency, ALJ independence must be protected from any actual or appearance of encroachment. The pending corps legislation, which would provide a separate corps of administrative law judges independent of the agencies, is intended to deal with some of these problems.

Thus, as part of our committee report to the National Conference of Administrative Law Judges, we proposed that the MSPB promulgate regulations for notice and comment to fully implement § 7521 and to address the subject of constructive violations. Finally, we urged the creation of a process for handling "nonpernicious" agency actions to be established outside the agencies. (Nonpernicious agency actions include those administrative actions not rising to a level of impeding on an ALJ's independence.)

Indeed, perhaps many of the complaints regarding alleged and prohibited *ex parte* contacts raised during the various ALJ furlough adjudications arose simply because of the MSPB's *ad hoc* approach and its failure to fully adopt standard rules and regulations for adjudication impacting ALJs.

Who Should Hear Complaints? Initially MSPB had indicated in its interim regulations implementing the Civil Service Reform Act of 1978 (P.L. 95454) (published January 19, 1979) that it would remain the presiding official in cases involving ALJs. 44 Fed. Reg. 3946. Subsequently, the Board reversed its position and decided that it would use ALJs to preside over cases involving other ALJs (5 C.F.R. § 1201.132 (44 Fed. Reg. 38,358, June 29, 1979).) In its *King* decision, 1 MSPB 144 (1979), the Board discussed the legislative history of the Civil Service Reform Act and concluded that Congress had not added any new protection for ALJs. The Board concluded that without specific statutory language accompanying House Report language referring to the "present system" for protecting ALJs controlled. Given that the ALJ of MSPB's predecessor, the Civil Service Commission, heard cases involving other ALJs, the Board concluded that the delegation to its jurisdiction over ALJs to a single peer ALJ was what had been intended by Congress (Id. 145-46).

However in *King*, the MSPB failed to note that its own regulation at the time (and its predecessor, the Civil Service Commission) provided that "[t]he Commission, or a member of the Commission, or one or more *administrative law judges* appointed... shall preside at any hearing" involving ALJs, 5 C.F.R. § 930.226 (1977) (emphasis added). This Civil Service Commission regulation remained the operative MSPB regulation until 1980 when the MSPB eventually adopted its own regulations. Thus, while the Board in *King* was correct that the practice at the Civil Service Commission was to have single ALJ hear cases involving other ALJs, both the Civil Service Commission and MSPB initially had regulations permitting multi-member ALJ panels for cases involving ALJs.

Currently the MSPB has only one ALJ hearing cases, rather than the two or three that it had in the past. Having just one ALJ at MSPB precludes the standard rotation of MSPB cases among a panel of ALJs. ALJs and their associations are concerned about the fairness

and appearance of fairness of all decisions being made by a single ALJ employed by MSPB. In our opinion, it is unwise and unfair to concentrate in one individual ALJ the primary responsibility for protecting the independence of the entire ALJ corps.

Thus, the second major issue which any proposed reform must address is the determination of who will hear and decide the propriety of agency action against an ALJ, who will review those determinations, and what will be the standard of review to be applied.

The committee concluded that use of a three-ALJ panel is preferable to the use of a single ALJ. Such a multimember panel is not a new concept. In 1979, the American Bar Association's Board of Governors and its Section of Administrative Law addressed this issue when reviewing regulatory reform legislation to amend the APA and the Civil Service Reform Act.

The legislation proposed to amend the APA by establishing a corps of ALJs managed by a single administrator and requiring that MSPB itself, not its ALJs or employees, hear and decide all cases involving ALJs.[5] The ABA adopted a resolution supporting these changes and also supported that part of the legislation providing that before any complaint based on performance could be filed by an agency against an ALJ at MSPB, the complaint must be first approved by an ALJ panel.[6]

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5 The legislation proposed that, concerning performance issues, no action could be lodged against an ALJ unless approved by a peer review board. Only after approval by the peer review board would performance-related charges be heard and decided by the full MSPB.

6 Contrary to the position taken by its Section of Administrative Law that the review boards need not contain a majority of ALJs, in the provision adopted by the ABA, the panel was required to contain at least a majority of ALJs who were not chief ALJs and who were not from the charging agency.

Subsequently, this proposal fell out of favor with the Section of Administrative Law. Some years later, the National Conference of Administrative Law Judges, with JAD support, helped draft a comprehensive corps resolution that the ABA passed on August 1988. The resolution included an endorsement of the three-ALJ-panel concept.

Even the Committee on Adjudication of the Administrative Conference of the United States (ACUS), in its final report—dated December 1992 and entitled "The Federal Administrative Judiciary"—recommended that for cases involving charges against ALJs that MSPB consider using a pool of ALJs or a multi-judge panel.

* * *

Delbert R. Terrill, Jr. is a judge with the Federal Energy Regulatory Commission, Washington, D.C., and served as chair of the NCALJ's Special Ad Hoc Committee to review the Merit System Protection Board.*

**Editor's Note:* This article is based on a report that was adopted by the ABA/JAD's National Conference of Administrative Law Judges (NCALJ) in August 1992. It has been substantially updated to reflect changes in both pending legislation and changes at the Merit Systems Protection Board itself. The report, a joint endeavor, was written by the NCALJ's Special Ad Hoc Committee to review the U.S. Merit System Protection Board's procedures, and was chaired by Judge Terrill. The other committee members, all of whom contributed very much to the report, were Judges Ronnie A. Yoder (DOT), Lawrence E. Shearer (SSA), and James P. Timony (FTC). The NCALJ chair for 1991-92, Judge Charles N. Bono, established the Special Ad Hoc Committee. All points of view expressed are those of the author alone.

* * *

RECOMMENDED REFORMS

The Special Ad Hoc Committee recommended and the National Conference of Administrative Law Judges adopted the following:

1. Petition MSPB to adopt rules fully implementing § 7521, including the establishment of procedures for ALJ-initiated MSPB review of agency actions as well and establishing a three-judge panel for proceedings involving ALJs.

2. Failing the above action by MSPB, petition Congress to enact legislation requiring that:

> a. for all MSPB adjudications involving ALJs, a three-member ALJ panel be appointed bo OPM to serve at MSPB to hear and decide the adjudication;
>
> b. OPM make appointments to the three-member panel by randomly drawing from a list composed of currently sitting ALJs [including any MSPB ALJ] who in response to a questionnaire from OPM have expressed their willingness to hear and decide cases involving other ALJs;
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> c. each three-member panel shall elect a chair for all oral rulings and shall make all other rulings by majority vote; and that
>
> d. no ALJ may hear a case involving an agency/department for which that ALJ previously served during the prior three years or is presently serving nor be hired by the agency/department involved for three years after conclusion of the proceeding before the panel.

3. Petition MSPB or OPM to conduct a study regarding alternatives to using the agency grievance process for handling the mediation of agency actions against an ALJ deemed "nonpernicious" by a three-member ALJ panel.

Subsequently, the Administrative Law Section adopted and recommended that the ABA House of Delegates approve NCALJ's proposed three-judge panel concept. At the 1994 ABA Annual Meeting in New Orleans, the ABA House of Delegates adopted the three-judge proposal.

APPENDIX C

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

94-3151

JOHN W. WHITTLESEY,

Petitioner,

v.

OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION,

Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

CASE NO(S). CB7521930005-T-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (NIES, NEWMAN, and LOURIE, *Circuit Judges*):

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED OCT 12 1994/stamp
Francis X. Gindhart/signature
Francis X. Gindhart, Clerk

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
OCT 12 1994
FRANCIS X. GINDHART, CLERK/stamp

APPENDIX D

§ 203

(e) (1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means-

(A) any individual employed by the Government of the United States-

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit if the legislative or judicial branch of the Government which has positions in the competitive service.

(iv) in a nonappropriated fund instrumentality under the jurisdiction if the Armed Forces, or

(v) in the Library of Congress;

CHAPTER 8-FAIR LABOR STANDARDS—Continued

§ 207. Maximum hours

(a) Employees engaged in interstate commerce, additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

213. Exemptions

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 if this title shall not apply with respect to-

(1) any employee employed in a bona fide executive, administrative, or professional capacity (included any employee employed in the capacity if academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subjected to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive of administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked ion the workweek are devoted to such activities); or

§ 541.3 Professional.

The term *employee employed in a bona fide***professional capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged court of specialized intellectual instruction and study, as distinguished course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, ...

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week ($150 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities:

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.118, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because-

(1) permission for its use not been sought or has been sought and denied;

(2) accrued leave has bees exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

Ban Ruled Unconstitutional

Telephone companies won another round in their affords to enter the cable-television market.

In a case brought by US West Inc., a federal appeals court in San Francisco declared unconstitutional a provision in 1994 federal Cable Act prohibiting phone companies from entering the cable-TV market.

A three-judge panel said the prohibiting is overly broad and violates the free-speech rights of US West, based in Denver. The panel also ruled in favor of Pacific Telesis Group, which had separately challenged the ban.

The court noted that the cable market has changed dramatically since Congress enacted the law, fearing trephone companies would monopolized the cable-TV market. "The government argues, however, that [the ban] promotes competition in three ways," the court said. "We fined that upon closer examination, two of these rationales are not supported by the evidence."

A federal appeals court in Richmond, Va., and three district court have ruled similarly. The U.S. government is expected to seek Supreme Court review of the issue.

Pacific Telesis plans to seek a permanent injunction prohibiting the government from enforcing the ban, said Steve Harris, external affairs vice president for Pacific Bell, a unit of Pacific Telesis, based in San Francisco.

(US West vs. U.S.A., Ninth U.S. Circuit Court of Appeals, 94-35775)

Wall St. Journal 1/3/95